93-28

Supreme Court, U.S.
FILED
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NIKOS VOULGARELIS -petitioner

vs.

EVELYN VOULGARELIS - respondent

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Nikos Voulgarelis
313 West 19th St. #51
New York N.Y. 10011
212- 255-2493

QUESTION PRESENTED

Whether, in a marital separation action, assets accumulated by each party separately AFTER such separation, constitute "marital" assets - for equitable distribution in a later divorce action- in view of a State law that considers marriage an "economic partnership" and contrary to the due process provisions of the fifth and fourteenth amendments to the United States Constitution.

THE QUESTION PRESENTED WAS DECIDED BY THE LOWER -APPELLATE - COURTS, AS FOLLOWS:

N.Y.State Court of Appeals in Anglin v Anglin, AFFIRMED 4-2

Appellate Div. 3rd Dept. in Anglin v Anglin, AFFIRMED 3-2

Appellate Div. 2nd Dept. in Lennon v Lennon, REVERSED 6-0

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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

Nikos Voulgarelis - petitioner

vs.

Evelyn Voulgarelis - respondent

PETITION FOR WRIT OF CERTIORARI TO

THE NEW YORK STATE COURT OF APPEALS

Petitioner, Nikos Voulgarelis, respectfully prays that a writ of certiorari issue to review an order of the New York State Court of Appeals denying reargument for leave to appeal a decision

of the Appellate Division 2nd Dept. which denied movant's claim that assets accumulated AFTER separation are not "marital" assets.

OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported in Anglin vs. Anglin, --NY2d.-- Slip op.,Dec 21, 1992 and appears in Appendix A of this petition. The opinion and order of the Appellate Division 2nd Dept. appears in Appendix B. New York Law Journal, Article Jan.14, 1992 at 3,col.3, appears in Appendix C.

JURISDICTION

The Appellate Division's Decision and Order was issued on May 26, 1992. A timely reargument motion was filed with the same court on June 9, 1992. The Court's denial of the petition was issued

July 1, 1992. A motion to the N.Y.S. Court of Appeals was filed Aug. 3, 1992 and a denial was issued Oct. 27,1992. A denial of petition for reargument was issued on Jan. 19,1993 and is set forth in Appendix D. This Court's Jurisdiction is invoked under title 28, U.S.C. section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V and XIV (due process provisions) to the United States Constitution are set forth in Appendix E. N.Y.State Domestic Relations Law 236(B) and subsections is evident in Appendices A, B and C.

STATEMENT OF THE CASE

After a divorce trial in the New York

State Supreme Court for the County of Suffolk, on Jan. 5, 1988, under the Equitable Distribution Provisions of the Domestic Relations Laws, an order was issued and amended Dec. 1,1988 awarding plaintiff/wife -inter alia- $57,500. as part of her share of the couple's "marital" assets.

Several objections to that decision were filed by the defendant/husband/movant, pro/se claiming -inter alia- a certain real property acquired by the defendant upon separation on Jan. 18,1980 and for the purposes of living apart from the wife/plaintiff, was not marital property. Defendant made that claim because..a) said property was acquired by him with money that the then prevailing law (Jan. 1980) recognized as his own money. and ..b) His action of buying the property was his alone and not in common with the wife, since they were separated

and no longer functioned as an "economic partnership" which N.Y.State Law (EDL) considers marriage to be.

Defendant further claimed that the two parties -upon separation on Jan.18,1980- had an "implied" and "contractual" separation agreement that pre-dated EDL (which took effect on July 19,1980) and included provisions for the distribution of the couple's assets. Said agreement was "implied" because it was not written but evidenced, testified to, at trial and not contested and "contractual" because it conformed to the terms where a court will almost always find a binding intent to contract i.e husband giving wife $11,000. (half the available cash), buying the property in question to move into and live apart from the wife and promising not to contest her right to the rest of the "marital" assets, at the divorce trial which he did not (contest).

According to New York State law regarding separation agreements that pre-date EDL, such agreements are valid in "opting-out" of EDL when they include provisions for the distribution of the marital assets. Trial and Appellate Courts failed to consider and issue a decision on this point.

On Dec, 21,1992 the New York State Court of Appeals decided the question of the cut-off date of accumulation of marital assets as been the day of filing for divorce and not the day the parties separated. The two dissenting justices stated that in view of the fact that the State recognizes the marriage as an "economic partnership", when that partnership dissolves, whether by separation or divorce it's fruits are no longer that of the partnership but of the individuals, separately. See AGLIN supra, complete decision Appendix A.

My motion to the same Court for leave to appeal made reference to the "Anglin" case which had not been decided at the time and in support of my petition, I submit the dissenting judges opinion, for, being pro/se, and without legal training, I don't think I can improve on the eloquence, logic and reasoning offered by dissenting Judges Hancock and Simons.

REASONS FOR GRANTING THE WRIT

If the "ANGLIN" decision is allowed to stand as the definitive word on assets accumulated AFTER separation, it will create enslavement of one partner to the other by taking one's property without benefit of partnership and due process and will restrain the separated parties from engaging in profitable commercial activities for fear that the fruits of their labors will be taken from them by the other, merely because they "used to be" partners.

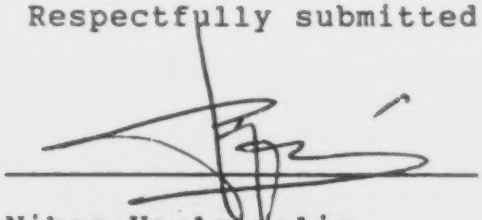
CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the decision of the New York State Court of Appeals in the "ANGLIN" case which by reference is applicable to my own.

If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the N.Y.State Court of Appeals for redetermination in light of the reasoning presented in this petition.

dated: May 21, 1993

Respectfully submitted,



Nikos Voulgarelis

petitioner pro/se

STATE OF NEW YORK

COURT OF APPEALS

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3 No. 271

Rachel Anglin, respondent ,

v.

Harold Anglin, Appellant.

Filed 12/21/82

David M. Siegal, for appellant.
George H. Barber, for respondent

O P I N I O N

this opinion is uncorrected and subject to revision before publication in the New York Reports.

BELLACOSA, J.:

The appellant-former husband presents a single statutory interpretation question for this Court to settle--whether a separation action ends the period for the accrual of marital property as prescribed by Domestic Relations Law section 236 (B)(1)(c). The Appellate Division, agreeing with the Supreme Court, held that the start of the

separation action did not effect that end. We, too, conclude that a separation action does not, ipso facto, terminate the marital economic partnership and therefore , does not preclude the subsequent accrual of marital property.

FACTS

The parties to this action were married in 1954 and have three children. In 1982, the wife brought a separation action against her husband, which was contested and did not go to trial until January 1988. In 1983 the wife was granted exclusive use and possetion of the marital residence, temporary maintenance and temporary child support. At times, after the separation action was commenced the parties continued to live in the marital residence together and filed joined tax returns. Two years after the separation action was commenced, they also travelled to Tennessee together. Following trial of the separation action,

at which the amount and duration of maintenance were the only contested issues, the wife was granted maintenance and a judgment of separation was entered on October 20, 1988.

In 1989, the wife commenced an action for divorce, pursuant to Domestic Relations Law section 170(5). The husband sought an order declaring that assets acquired after the commencement of the 1982 separation action were not marital property. The wife cross-moved to set the much later date of the commencement of the divorce action as the cutoff, after which property acquired would not be considered marital property.

Supreme Court, Albany County, noting the divided views of the various Appellate Divisions on this narrow but critically important point of law, fixed the commencement date of the divorce action as the marital asset accrual cutoff date.The Appellate Division, Third

Department, agreeing with Supreme Court and views of the First and Fourth Departments on this issue, affirmed by a vote of 3-2. The Appellate Division then granted permission to the husband to appeal to this Court on a certified question.

DISCUSSION

The Domestic Relations Law and its equitable distribution regime are complex, interlocking statutory frameworks. As this Court recently observed in Mtr of Aaron J. (___NY2d__Slp opn, decided 11-24-92, at 8) we are obliged in interpreting such statues to "harmonize the various provisions *** and to construe them in a way that renders them internally compatible". In a subpart captioned "definitions", Domestic Relations Law sec. 236(B)(1)(c) states that the term 'marital property' shall mean all property acquired by either

or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action (emphasis added). Nowhere in the subpart captioned "definitions" is the term 'matrimonial action' defined.

Appellant urges a plain meaning approach to the understanding and application of the Domestic Relations law sec.236(B)(1)(c). He maintains that by the clear definitional language", a matrimonial action must include a separation action as he points to the reasoning of the Second Department in Lennon v Lennon (124 AD2d 788) which stands alone against the contrary views of the other three Appellate Division Departments. the Second Department relied on a discrete subpart of the same statute, Domestic Relations Law sec. 236(B)(2), captioned "Matrimonial Actions",which lists 11 types of matrimonial actions, and used that enumeration as an aid to defining

"matrimonial action" for purposes of the equitable distribution provision, Domestic Relations Law sec.236(B)(1)(c). Because an action for separation is included in the Domestic Relations law sec. 236(B)(1)(c) list, appellant, the Lennon court and the dissent base their further analysis on the predicate that the mere delineation in section 236(B)(1)(c) is self defining and self-executing .

Their plain meaning approach, however, fails to give sufficient consideration to the fact that also included in the Domestic Relations Law sec. 236(B)(2) list of "Matrimonial actions" are actions that could not possibly serve as the cutoff point for the acccrual of marital property. For example, the list includes actions for "declaration of the *** nullity of a foreign judgement of divorce (and) for a declaration of the validity *** of a

marriage" (Domestic Relations Law 236(B)(2). The objective of these actions as Justice Levine convincingly observed in his majority opinion below, is "a judicial declaration of the continued existence of the marital relationship" (Anglin v Anglin, 173 AD2d 133, 135 (emphasis in original). If one of these actions, by the so-called plain meaning "matrimonial actions" litany, were held to demarcate the end of the marital property accrual period, an inexplicable contradiction is plainly evident.

Thus, "matrimonial action" for the purpose of defining the termination point for the further accrual of marital property cannot be governed by an overly inclusive and generalized list but must instead acquire its meaning in relation to the overall legislative intent of the Domestic Relations Law and within the particular application of the equitable distribution regime. We should not accept

or view Domestic Relations Law sec. 236(B)(2) as a definitional list for all purposes.

We are aided in the view we adopt by the express terms of section 236(B)(1)(c) which draws a parallel between a "separation agreement" and the "commencement of a matrimonial action" (emphasis added). Either category serves to demarcate the closing date of the property accrual period. The appellant-former husband would construe the categories so that either a separation agreement or the commencement of a separation action "objectively signifies the end of the marital partnership" and "clearly signals the end of the economic partnership of the marriage". That conclusion may not be so facilely accepted. The economic partnership should be considered dissolved when a matrimonial action is commenced which seeks "divorce, or the

dissolution , annulment or declaration of the nullity of a marriage", i.e. an action in which equitable distribution is available (see Domestic Relations Law sec.236(B)(5)). That provides internal consistency and compatibility and objective verification, as opposed to uneven, ephemeral, personal interpretations as to when economic marital partnerships end. This Court has said that the "winding up of the parties 'economic affairs and severance of their economic ties by an equitable distribution distribution of the marital assets"-- a winding up consistent with the termination of a partnership -- is to be carried out "upon dissolution of the marriage" (O'Brien v O'Brien' 66 NY2d 576, 585 (emphasis added). All separation actions do not actually or realistically constitute the functional or cognizable equivalent of the dis-

solution of a marital economic partnership or a marriage itself. Indeed, a separation decree, using somewhat outdated terms, serves only to "separate the parties from bed and board, forever, or for a limited time" (Domestic Relations Law sec/ 200 (emphasis added)). Moreover, while a separation judgement may be used as a predicate for divorce, (see, Domestic Relations Law sec. 170(5), the law requires another definitive act by a party-- a discreet action at law-- to legally effectuate the divorce objective and terminate a marriage.

It is pertinent that the legislature has expressly allowed a separation agreement to fix the cutoff date for the accrual and control the distribution of the economic fruits of the marital economic partnership. In effect, the legislature, has allowed parties to "contract out of the system of marital property and maintenance" (see, Member of Assemly Memorandum, JN.Y. State Legis. Ann.

1980, at 130). Because a separation agreement constitutes a voluntary bilateral mechanism allowing parties to opt out of the statutory equitable distribution regime, the statute places the agreement on a par of materiality and legal effect with the commencement of a qualifying matrimonial action that would legally terminate the marital economic partnership . As Justice Levine aptly noted, "because the spouses have the power to provide for the entire disposition of marital assets in a separation agreement, and commonly do so, it was appropriate and consistent to designate the execution of a separation agreement as an alternative terminating event in defining marital property for equitable distribution purposes in Domestic Relations Law sec. 236(B)(1)(c)' (Anglin v Anglin, 173 AD2d, 133, 136, supra (emphasis added).

Appellant offers counter-arguments that the courts should carefully differentiate between the distribution of marital property under section 236(B)(5) and the demarkation of its accrual specified in section 236(B)(1)(c) (see also, Florecsue, the cutoff to Accrual, NYLJ, Aug. 10, 1992 at 3, col 3). We acknowledge the distinction, but emphasize, too, that this variation does not alone resolve the precise question before us, which is whether the legislature has chosen a separation action as the cutoff for the accrual of marital property, as prescribed in Domestic Relations Law sec.236(B)(1)(c). Judicial policy preferences are irrelevant and not controlling in answering that question. In the interpretative context, courts are obliged to "harmonize the various provisions " of the statute (Mtr. of Aaron J., __NY2d__ (slip opn, Decided 11-24-92, at 8), supra) and, thus, must read

the entire law and accord respect to the interlocking and interrelated features of all its parts. Although subsection 5 of section 236(B) purports only to govern the equitable distribution of marital property, it nevertheless also provides valuable quidance in the search for what the intergated statute was intented to mean and informs the judicial ascertainment of a solution that gives all parts of the statute consistent and effective meaning (see, Mtr. of Aaron J.,supra; Mtr. of Soc. of N.Y. Hosp. v Del Vecchio, 70 NY2d 634, 636; Statutes, McKinney's Cons Laws of NY, Book 1, secs 97, 98). The specific equitable distribution words and provisions of the legislature must be accorded appropriate weight in this context and, in our view, they should enjoy precedence over a generalized enumeration provision. By this method and assessment, a real harmonization and

effectuation of the purpose intended by the legislature is accomplished.

Notably, the Legislature has given the courts significant flexibility in fashioning the appropriate remedy of equitable distribution of marital property . The commencement of a separation action may be considered as a factor by courts, among other relevant factors, as they attempt to calibrate the ultimate equitable distribution of marital economic partnership property aquired after the start of such an action by either spouse (see, Anglin v Anglin, 173 AD2d 133, 137, supra). The Legislature has wisely refrained from excluding, arbitrarily and per se, assets acquired subsequent to the commencement of a separation action from the potential pool of accruing marital property. We have correspondingly noted that the Legislature deliberately defined marital property "broadly", and we have upheld

that "broad construction" (see, Price v Price, 69 NY2d 8, 15; Majauskas v Majauskas, 61 NY2d 481, 489). The rigid formula advocated by the appellant and adopted by the dissent in this purely statutory interpretation case, would incongruously retreat from the flexibility properly reposed in the courts in this sensitive and difficult area. The net result in this case would also be demonstrably unfair.

We have considered all the other arguments presented and conclude they are without merit .

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

Anglin v Anglin

No. 271

HANCOCK, J. (Dissenting):

However it may be characterized, the majority holds that under Domestic Relations Law sec. 236(B)(1)(c) neither a separation action nor a separation judgement dissolves the marital economic partnership so as to terminate the accrual of marital assets for equitable distribution (see, Maj Opn, at 5-6). Thus, even though the marriage relationship has deteriorated to the point where one party has sued for and even obtained " a judgement separating the parties from bed and board, forever, or for a limited time" (Domestic Relations Law sec. 200), the individual assets of the husband and wife continue to be lumped together for eventual

distribution as marital property when the marriage is finally dissolved. The majority's holding that the economic part- survives the discord of a separation action is incompatible with the well-defined concept of the "economic partnership" relationship as the centerpiece of the Equitable Distribution Law (see, price v Price, 69 NY2d 8, 14; O"Brien v O"Brie, 66 NY2d 576, 585; Majauskas v Majauskas, 61 NY2d 481, 489.

"Economic partnership" is not some abstract state which is deemed to exist by virtue of the marriage contract. On the contrary, "economic partnership" is a specific conception of the marriage relationship which the Legislature has adopted as a fair and realistic basis for the division of property when the marriage terminates. It is a practical concept reflecting the trust, the interdependence and the voluntary sharing

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of the obligations of supporting, maintaining and nurturing the family that takes place when the parties function together as an economic unit. The concept reflects what married people living together actually do and how they function when operating as an economic unit, not some theoretical notion of how married but separated people might function if they were not separated. Because the majority opinion is predicated on a novel theory of "economic partnership" which is contrary to established precedent, antithetical to the essential basis of equitable distribution and inconsistent with the plain language practical sense of the statute, I dissent.

In O'Brien v O'Brien (supra) at 584-585), we explained that in enacting Part B of Domestic Relations Law sec. 236 the Legislature replaced the traditional common-law title theory of property with an

entirely new theory-- equitable distribution. Citing the Governor's Memorandum of Approval[1], we emphasize that "equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker" (id. at 585 (emphasis added)). In O'Brien, the husband's professional medical license was held to be marital property because the wife helped support him financially and emotionally while he studied for the license (id. at 585-586). The economic partnership idea as the basis of equitable distribution was further refined in Price v Price (supra), where we noted that the concept "reflects an awareness that the economic success of the partnership depends 'not only upon the respective financial contributions of the

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1/ Governor's Memorandum of Approval, 1980 McKinney's session laws of NY, at 1863; see also, Assembly Memorandum, 1980 NY Legis Ann, at 129-130.

partners, but also on a wide range of nonremunarated services to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home'"(id. at 14 (quoting Brennan v Brennan, 103 AD2d 48, 52)). In Price we held that where a separately owned company had appreciated during the marriage "due in part" to the contributions of the nontitled spouse in homemaking and attending business conventions with her husband, the appreciation constituted marital property (id. at 17; see also Majauskas, supra, at 488-490 (vested pension rights held to be marital property on economic partnership theory)).

The majority finds a sufficient ground for the economic partnership and the continued accrual of marital property

in the legal existence of the marriage irrespective of the actual relationship of the parties. In this holding, the majority ignores the teaching of Price, O'Brien and Majauskas and creates a troubling precedent which cuts against the very purpose of equitable distribution[2] -- i.e. a fair distribution of only the property the parties accumulated during the marriage as a result of their joint, cooperative endeavors. Thus, under today's decision, a married couple (such as the parties here) may live separate and apart for years after commencement of a separation action and the grant of a decree; their affection

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[2] A large body of law has developed around the concept "economic partnership" as the basis for marital property (see e.g., Finacchio v Finacchio, 162 AD2d 1044: Fish v Fish, 161 AD2d 979; Dzembo v Dzembo, 160 AD2d 1144; Smith v Smith, 154 AD2d 365; Anderson v Anderson, 153 AD2d 823: Mahab v Mahab, 143 AD2d 116; Behrens v Behrens, 143 AD2d 617; Rider v Rider,

for each other and the mutual trust and respect necessary for the sharing of marital obligations may have long since vanished; yet, the economic partnership will be deemed to continue and their individual assets will be pooled for eventual distribution as marital property.

The sole aim of replacing the rigid and sometimes unjust common law property doctrines used in the division of marital property with a new system of equitable distribution Was greater fairness to the parties on dissolution of the marriage. Clearly, that aim is achieved by the lumpiing together for distribution what is accumulated while the parties actually function as and contribute to an economic unit. for then it is appropriate and fair that individual property interests should give way and that in making the equitable distribution, the

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141 AD2d 1004; Josem v Josem, 134 AD2d 486; Clerk v Clerk, 132 AD2d 456; see also, Scheinkman, practice Commentaries,

Court should recognize "the value of 'non-remunarated services' such as homemaking" "and consider any contributions and services as a spouse, parent *** and homemaker'" Price, supra, at 14-15 (quoting Domestic Relations Law sec. 236(B)(5)(d)(6)). It is difficult at best to understand, nor does the majority explain, how the aim of fairness is furthered --or any legitimate purpose, for that matter -- by ignoring the realities of the marital relationship and ordering the continuied merging of the marital assets after the parties have legally separated and after any basis for an actual economic partnership has ceased to exist (see, Florescue, the Cutoff to Accrual, NYLJ, August 10, 1992, at 3 col 1 ("The statutory goal (of the equitable Distribution Law) is to distribute "equitably" the fruits of the marital

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McKinney's Cons Laws of NY, Book 14, C236B:4-8, at 191-223).

partnership. Once that partnership has ceased to exist, its fruits should too")).

II

That the mixing of the parties' individual assets as marital property should cease when a separation action is started or a decree obtained is dictated by the plain wording as well as the sense of the statute. Under the Equitable Distribution Law, "marital property" is defined as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action" (Domestic Relations Law sec.236(B)(1)(c) (emphasis added)). Domestic Relations Law sec 236(B)(2), entitled "Matrimonial actions", states that "except as provided in (Domestic Relations Law sec. 236(B)(5)) the provisions of this part shall be applicable to actions for *** a separation" (emphasis

added). The logic of the statutory scheme is clear: to constitute marital property for equitable distribution upon final dissolution of the marriage, the property of the inividual partners must be acquired during the marriage and before steps are taken which signify the breakup of the marital partnership. It is, of course, a basic rule of construction that "statutory language is generally given its natural and most obvious meaning" (Price v Price, supra, at 15(citing McKinney's Cons Laws of NY, Book 1, Statutes S 94)). Yet the majority rejects the directive of the statute from its plain wording: that marital property should not continue to accrue after "the commencement of a matrimonial action" (sec.236(B)(1)(c) (emphasis added) and that by the terms of the statute an action "for a separation " is a matrimonial action (sec.236(B)(2)).

It is also a basic rule that an interpretation of a statute should be rejected if it produces a result which is unreasonable or unfair (see, Ferres v City of New Rochelle, 68 NY2d 446, 454; McKinney's Cons Laws of NY, Book 1, statutes ss 141, 143, 146). Here, the result of the majority's construction is both unreasonable and unfair -- a party's individual property will be included in the mix of assets as marital property even after the marriage is a "dead marriage", after the parties have ceased to function as an economic unit and after the actual marital partnership no longer exists.

Moreover, the majority construction produces an anomaly. Section 236(B)(1)(c) provides that both the execution of a separation agreement and the commencement of a matrimonial action have the effect of cutting off the accrual of marital property. Yet, under the majority decision, neither the commencement of a

separation action nor even the filing of a separation decree stops the accruing of marital property ---although a separation, if pursuant to an agreement, concededly has the effect (see Milbandt v Green Co., 79 NY2d 26, 36 (a construction which produces an anomaly should be avoided)). Here, for example, the parties lived apart, after commencement of a separation decree which contained provisions for maintenance and exclusive possession of the house. Under the majority decision until the divorce action was commenced whatever additional assets that the parties acquired after separation are treated as marital property. If the parties had separated pursuant to an agreement containing the same terms as in the temporary order and separation decree, their individual assets would not be treated as marital property. In both the actual as well as the assumed case,

the fact of separation dispels any possibility of the ongoing cooperation and sharing of the mutual obligations on which the economic partnership is based. No reason is suggest for these conflicting results. To be sure, a separation agreement implies that the separation was voluntary, even amicable, while a separation action bespeaks an involuntary separation, one that may be fraught with bitter marital strife. If anything, such involuntary separation seems even more antagonistic to the concept of the economic partnership than a separation under an agreement.

The majority offers no reason as to how its decision furthers the underlying purpose of the Equitable Distribution Law--i.e. distributing property resulting form the economic partnership. Rather, it stresses the point made by the Appellate Division (173 AD2d 133, 135)

that actions to declare the nullity of a foreign divorce and for the validity of a marriage --both assertedly presupposing the "continued existence" of the marriage- are included as "matrimonial actions" in section 236(B)(2). Thus, it is argued, little significance should be attached to the inclusion of separation actions in the same section. No authority is cited for the majority's proposition that an action to nullify a foreign divorce or to declare a marriage valid is necessarily one brought for " the continued existence of the marital relationship". Maj opn, at 4 (quoting Anglin v Anglin, 173 AD2d 133, 135)). Certainly, the fact that the parties have had to resort to litigation over some disputed issue suggests that whatever marriage might continue will be less than amicable. But , in any event, the argument overlooks the critical point: that it is the existence of the

economic partnership, not of the marriage as a legal entity, on which the accrual of marital property and the very concept of equitable distribution are based.

* * * * * * * * * * * * * * * * * * * *

Order affirmed, with costs, and certified question answered in the negative. Opinion by Judge Bellacosa. Judges Kaye, Titone and Smith concur. Judge Hancock dissents and votes to reverse in an opinion in which Acting Chief Judge Simons concurs.

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

__AD2d__ Argued- April 21,1992

LAWRENCE J.BRACKEN J.P.
CHARLES B.LAWRENCE
DAVID S. RITTER
JOHN COPERTINO, JJ.

DECISION & ORDER

90-04308, 90-04309

Evelyn Voulgarelis,respondent, v.
Nikos Voulgarelis, appellant

Nikos Voulgarelis, New YorkN.Y.,Appellant pro/se.

In an action for a divorce and ancillary relief, the defendant husband appeals (1) from an order of the Supreme Court, Suffolk County (Dunn, J.), dated December 1, 1988, which granted the motion of the plaintiff wife, inter alia, for the appointment of a receiver of the premises located at 72 South First Street, Brooklyn, for the purpose of selliing the property at a private sale for cash, and (2) from an order of the same court, dated March 7, 199, which, inter alia, denied the husband's motion for a new trial and for a change of

venue. ORDERED that the orders are affirmed, without costs or disbursements. The husband contends that the trial court improperly applied the Equitable Distribution Law set forth in Domestic Relations Law sec. 236(B) in determining the disposition of the parties property, since the parties separated prior to the effective date of the statute. We disagree.

As set forth in Domestic Relations Law sec. 236 the provisions of Part B shall be controlling with respect to any action or proceeding commenced on or after July 19, 1980, the effective date of the statute. Since the wife commenced the divorce action in April 1986 the application of the Equitable Distribution Law was proper in this case.

The Court properly denied the husband's application for a new trial on the issue of whether a house located in

Riverhead constituted the wife's separate property. He contends that that determination was based upon perjured testimony. In support of that allegation, he submitted an affidavit by the parties' daughter contradicting the mother's testimony . That affidavit did not establish that the Court's findings were clearly erroneous (see People v Armstead, 98 AD2d 726). w

We have reviewed the husband's remaining contentions and conclude that they are without merit.

BRACKEN J.P. LAWRENCE, RITTER and COPERTINO, JJ, concur.

ENTER

Martin H. Brownstein

clerk

MAY 26, 1992 VOULGARELIS v VOULGARELIS

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of January A.D.1993

PRESENT, HON. RICHARD D. SIMONS, acting chief Judge, presiding.

Mo. No. 1269

Evelyn Voulgarelis, respondent,

v.

Nikos Voulgarelis , appellant.

A motion for reargument of motion for leave leave to appeal to the Court of Appeals and for a stay and application for an "order to show cause" in the above cause having heretofor been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reargument of motion for leave to appeal be and the same hereby is denied; and it is ORDERED, that the said motion for a

stay and application for an "order to show cause" be and the same hereby is dismissed as academic.

Donald M.Sheraw
Clerk of the Court

DUE PROCESS PROVISIONS OF THE FIFTH AND THE FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Fifth: ....nor shall any person ....be deprived of life, liberty or property, without due process of law....

Fourteenth: ..... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.